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WILLKIE FARR & GALLAGHER

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Three Lafayette Centre  
1155 21st Street, NW  
Washington, DC 20036-3384

202 328 8000  
Fax: 202 887 8979

EX PARTE OR LATE FILED

February 14, 2000

Magalie Roman Salas, Secretary  
Federal Communications Commission  
Room TW-A325  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

Re: Ex Parte

Applications for Consent to the Transfer of Control  
of Licenses and Section 214 Authorizations from U S  
WEST, Inc., Transferor, to Qwest Communications  
International Inc., Transferee, CC Docket No. 99-272

Dear Ms. Salas:

On February 11, 2000, Randall Rings and Stacey Stewart of McLeodUSA Telecommunications Services, Inc. (McLeodUSA) and I met with James R. Bird, and Paula Silberthau of the Office of General Counsel and Robert C. Atkinson, Donald K. Stockdale, Margaret Egler and Henry Thaggert of the Common Carrier Bureau. During the meeting we discussed the divestiture required to bring Qwest Communications International Inc. (Qwest) into compliance with Section 271 of the Communications Act in the event that it proceeds with the transaction proposed in the above-referenced applications.

More specifically, we described communications that McLeodUSA received from Qwest executives on February 9, 2000 that bear upon the divestiture. The substantive elements of the communications are set forth in the affidavits of Blake Fisher and Scott Cate, copies of which are appended hereto as Exhibits A and B respectively (originals will be filed with the Commission promptly). The affidavits describe conversations with senior Qwest executives that disclosed Qwest's desire to sell the 271-implicated assets to a friendly buyer so the assets could be reacquired in the future and Qwest's unwillingness to consider McLeodUSA as a buyer of the assets unless and until McLeodUSA withdrew its opposition to the merger.

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Individually and together, the affidavits pose several very troubling questions. First, Qwest's desire to exclude McLeodUSA (and perhaps other potential buyers perceived as unfriendly) would raise serious issues even considered in a vacuum. It is unclear why any entity attempting a clean divestiture would exclude any qualified buyer, since to do so risks a lower price. Of course, if Qwest is netting out the sales price of the assets against the cost to Qwest of increased competition, it may be rational to exclude some or all of the competitors that Qwest believes may be particularly effective. That type of calculation only underscores the extraordinarily provocative nature of the proposed merger, uniting as it would an incumbent local exchange company with a significant interexchange company. A divestiture rigged to steer the assets away from strong competitors cannot be considered a positive in the balance of the positive and negative effects of the proposed merger.

Second, there is probable cause to suspect that a great deal more is taking place. An effort to park the assets for later reacquisition bears upon both compliance with the requirements of Section 271 and the extent to which the Commission should rely upon Qwest's claims of increased incentives to meet the checklist and other 271 requirements (and thus improve wholesale quality of service) to overbalance the negative effects of the merger. If the divestiture is supposed to result in no diminution in Qwest's incentive to secure Section 271 approvals, McLeodUSA submits that a sale subject to an explicit or implicit parking arrangement fails to meet the requirement.

The actual consequences of such an arrangement are of course derivative of factual details regarding the divestiture that are not currently available. The Commission must take seriously, however, the possibility that the sale of the Qwest Section 271 assets to a friendly buyer would allow U S WEST, Inc. (U S WEST) to participate in the in-region interLATA business prior to receiving Section 271 approval. This was of course exactly the concern that caused the Commission to declare the U S WEST/Qwest joint marketing arrangement unlawful under Section 271. See AT&T v. Ameritech et al, 13 FCC Rcd 21438 (1998) aff'd U S WEST Communications, Inc. v. FCC, 177 F.3d 1057 (D.C. Cir. 1999). Placing long distance customers in the hands of a "friendly" third party would also give the U S WEST ILECs the incentive to discriminate in favor of the third party in violation of Section 251 (and of course the Section 271 checklist). In addition, such an arrangement could insulate a segment of the market from competitive providers of long distance service since the customers would be essentially held in trust for Qwest/U S WEST.

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This effect would diminish further the merged firm's incentive to comply with Section 271 since Qwest/U S WEST would be less concerned that competing providers of bundled services such as McLeodUSA could win those customers before the merged firm receives Section 271 approval.

Third, there is something profoundly offensive to the ethos of public regulation in Qwest's effort to coerce McLeodUSA into dropping its advocacy of conditions designed to prevent yet further deterioration in U S WEST's wholesale service quality as a result of the merger. The Communications Act and many of its state counterparts are designed to accommodate broad participation in matters such as the Qwest-U S WEST transaction. One of the principal motifs of administrative law is that important decisions will benefit qualitatively from full participation by anyone with something to contribute. An effort to induce McLeodUSA to abandon its participation is an effort to deprive the process and the decisionmakers of information and perspectives that should, by the basic assumptions of administrative law, lead to a better decision.

Pursuant to Section 1.1206(b)(1) of the Commission's rules, 47 C.F.R. § 1.1206(b)(1), an original and one copy of this letter and attachments are being provided for inclusion in the public record of the above-referenced proceeding.

Sincerely,

  
Philip L. Verveer

Attachments

cc: James R. Bird  
Paula Silberthau  
Robert C. Atkinson  
Donald K. Stockdale  
Margaret Egler  
Henry Thaggert

A

## **AFFIDAVIT OF BLAKE FISHER**

**STATE OF UTAH**

**COUNTY OF SALT LAKE**

Blake Fisher, being just duly sworn on oath, deposes and states as follows:

1. I am a Group Vice President of McLeodUSA, with responsibility for the planning and development of the company's network. I am also a member of the Board of Directors, and a former Chief Financial Officer of the company. I am over 21 years of age and believe in the obligations of an oath.
2. As part of my normal course of business, on Wednesday, February 9, 2000, I was speaking on the telephone with my colleague from McLeodUSA, Mr. Scott Cate, Group Vice President in charge of the long distance product, and also with Messrs. Greg Casey, Executive Vice President and Wisenberg (not sure of spelling), Vice President, senior executives with responsibility for wholesale operations and strategic relationships, respectively, at Qwest.
3. In the course of the conversation, I mentioned that Mr. Cate and others were about to travel to a meeting at Qwest to discuss the possibility of McLeodUSA purchasing the assets that Qwest is divesting pursuant to its Divestiture Plan filed with the FCC (to discharge its obligations under section 271 of the Telecommunications Act of 1996 so it can complete its acquisition of US West.) Mr. Casey stated that "we don't think it makes much sense for McLeodUSA to come to Qwest to inspect the Divestiture Assets because Qwest wants to work with a friendly party and enter into certain co-

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sourcing  
marketing and co-sourcing arrangements." It was clear to me that Mr. Casey was implying that Qwest would likely require any buyer of the Divestiture Assets to purchase billing and other services from Qwest.

4. Mr. Casey continued, "Given McLeodUSA's opposition to Qwest's merger at the FCC and at various state public utility commissions, we [Qwest] won't make ourselves available to McLeodUSA employees or sign a confidentiality agreement allowing McLeodUSA to participate in the auction for the Divestiture Assets unless McLeodUSA drops its opposition to the merger."
5. Mr. Casey continued that McLeodUSA "would be a good choice to buy the assets" except that Qwest management felt that it could not enter into the type of co-marketing or co-sourcing agreements it was contemplating with McLeodUSA since it was opposing the merger at the FCC and at various state public utility commissions. Mr. Casey continued that Qwest would seriously consider negotiating with McLeodUSA to sell the Divestiture Plan assets to McLeodUSA, if McLeodUSA should drop its opposition to the Qwest/US West merger. If not, then McLeodUSA was instructed to return the information package on the Divestiture Assets which it had already received.

FURTHER AFFIANT SAYETH NOT

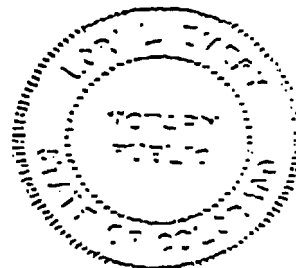


Blake Fisher

Subscribed and Sworn To before me this the 14th day of February, 2000.



Lori L. Emery  
My Commission Expires  
July 1, 2003



**B**

## **Affidavit of Scott Cate**

STATE OF UTAH

COUNTY OF SALT LAKE

SCOTT F. CATE, being just duly sworn on oath, deposes and states as follows:

1. I am a Group Vice President of McLeodUSA, with responsibility for the company's long distance product. I am over 21 years of age and believe in the obligations of an oath.
2. As part of my normal course of business, on Wednesday, February 9, 2000, at approximately 10:00 AM, I was speaking on the telephone with Mr. James Shearburn, a Regional Vice President for Qwest.
3. In the course of the conversation, I mentioned that I was about to travel to another meeting with colleagues of Mr. Shearburn's, to discuss the possibility of McLeodUSA purchasing the assets that Qwest is divesting pursuant to its Divestiture Plan filed with the FCC, to discharge its obligations under section 271 of the Telecommunications Act of 1996 so it can complete its acquisition of US West.
4. Mr. Shearburn picked up on that, and stated to me that McLeodUSA "would be perfect for that [to buy the assets]" except that Qwest management was angry at McLeodUSA for objecting to the merger at various state public utility commissions. He stated that McLeodUSA "is not making the [Qwest] top brass happy."
5. Mr. Shearburn continued that Qwest would really like to sell the Divestiture Plan assets to a "friend", "so that we can buy them back later." Mr. Shearburn continued, that



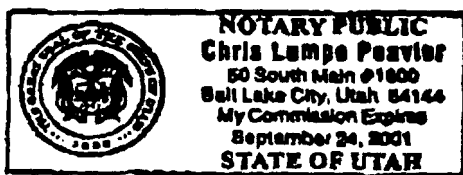
McLeodUSA's objections to the Qwest/US West merger would deem McLeodUSA not a "friend" who could be counted upon to later sell back the Divestiture Plan assets to Qwest, so that Qwest would therefore probably not sell the assets to McLeodUSA in the first place.

FURTHER AFFLIANT SAYETH NOT

Scott F. Cate

Scott F. Cate

Subscribed and Sworn To before me this the 10th day of February, 2000.



Chris Lampe Peavler

Notary Public for Utah

### **CERTIFICATE OF SERVICE**

I, Carmen D. Minor, do hereby certify that on this 14th day of February, 2000, I have caused a copy of the foregoing *Ex Parte* filing to be served, via hand delivery or first class United States Mail, postage prepaid, upon the persons listed on the attached service list.

  
Carmen D. Minor

## SERVICE LIST

### \*Served via Hand Delivery

\*Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Room TW-B-204  
Washington, DC 20554

\*International Transcription Service  
1231 - 20<sup>th</sup> Street, NW  
Washington, DC 20036

\*Janice Myles  
Policy and Program Planning Division  
Common Carrier Bureau  
445 12<sup>th</sup> Street, SW  
Room 5-C-327  
Washington, DC 20554

J. Carl Wilson  
Lisa B. Smith  
MCI WorldCom, Inc.  
1801 Pennsylvania Avenue  
Washington, DC 20006

Mark Rosenblum  
Ray Hoffinger  
Aryeh S. Freidman  
AT&T  
295 N. Maple Avenue  
Basking Ridge, NJ 07920

Thomas M. Koutsky  
Jason Oxman  
Covad Communications Company  
600 14<sup>th</sup> Street, NW  
Suite 750  
Washington, DC 20005

Clay Deanhardt  
Covad Communications Company  
2330 Central Expressway  
Building B  
Santa Clara, CA 05050

J. Richard Smith  
Craft Fridkin & Rhyne  
1100 One Main Plaza  
4435 Main Street  
Kansas City, MO 64111

Peter Froning, Executive Director  
New Mexico Rural Dev. Response Council  
Alvarado Square  
Mail Stop 0402  
Albuquerque, NM 87158

John W. Mooty  
Gray Plant Mooty Mooty & Bennett  
(Attorneys for U S WEST Retiree Assoc.)  
3400 City Center  
33 South Sixth Street  
Minneapolis, MN 55402

Drake S. Tempest  
Genevieve Morelli  
Qwest Communications International, Inc.  
555 17<sup>th</sup> Street  
Denver, CO 80202

Peter A. Rohrbach  
Mace J. Rosenstein  
Hogan & Hartson LLP  
555 13<sup>th</sup> Street, NW  
Washington, DC 20004

Thomas Jones  
Willkie Farr & Gallagher  
(Attorneys for McLeod USA  
Telecommunications Services)  
1155 21<sup>st</sup> Street, NW  
Suite 600  
Washington, DC 20036

R. Gerald Salemme  
Daniel Gonzalez  
Aline Miller  
NEXTLINK  
1730 Rhode Island Avenue, NW  
Suite 1000  
Washington, DC 20036

Brian D. Thomas  
Gary Yaquinto  
GST Telecommunications, Inc.  
4001 Main Street  
Vancouver, WA 98663

Kath Thomas  
Advanced Telecom Group, Inc.  
100 Stony Point Road  
Suite 130  
Santa Roas CA 95401

Victoria T. Auguilar  
First World Communications, Inc.  
8390 E. Crescent Parkway  
Suite 300  
Greenwood Village, CO 80111

Gary Slaiman  
Kristine Dervy  
Swidler Berlin Shereff & Friedman  
(Attorneys for Ensure Responsible Billing)  
3000 K Street, NW  
Suite 300  
Washington, DC 20007

Daniel M. Waggoner  
Gregory J. Kopta  
Robert S. Tanner  
Davis Wright Tremaine  
(Attorneys for Nextlink, ATGI, GST and  
Firstworld)  
1500 K Street, NW  
Suite 450  
Washington, DC 20005

James R. Scheltema  
Blumenfeld & Cohen  
(Attorneys for Rhythms Netconnections,  
Inc.)  
1625 Massachusetts Avenue, NW  
Suite 300  
Washington, DC 20036

Jeffery Blumenfeld  
Chief Legal Office – General Counsel  
5933 S. Revere Parkway  
Englewood, CO 80112

Richard S. Becker  
James S. Finerfrock  
Richard S. Becker & Associates  
(Attorneys for TSR Wireless LLC)  
1915 Eye Street  
Suite 800  
Washington, DC 20006

Mark D. Roellig  
Daniel L. Poole  
Sharon J. Devine  
U S West, Inc.  
1801 California Street  
Denver, CO 80202

Kathryn A. Zachem  
Carolyn W. Groves  
Wilkinson Barker Knauer, LLP  
2300 N Street, NW  
Suite 700  
Washington, DC 20037

William T. Lake  
Wilmer Cutler & Pickering  
2445 M Street, NW  
Washington, DC 20037